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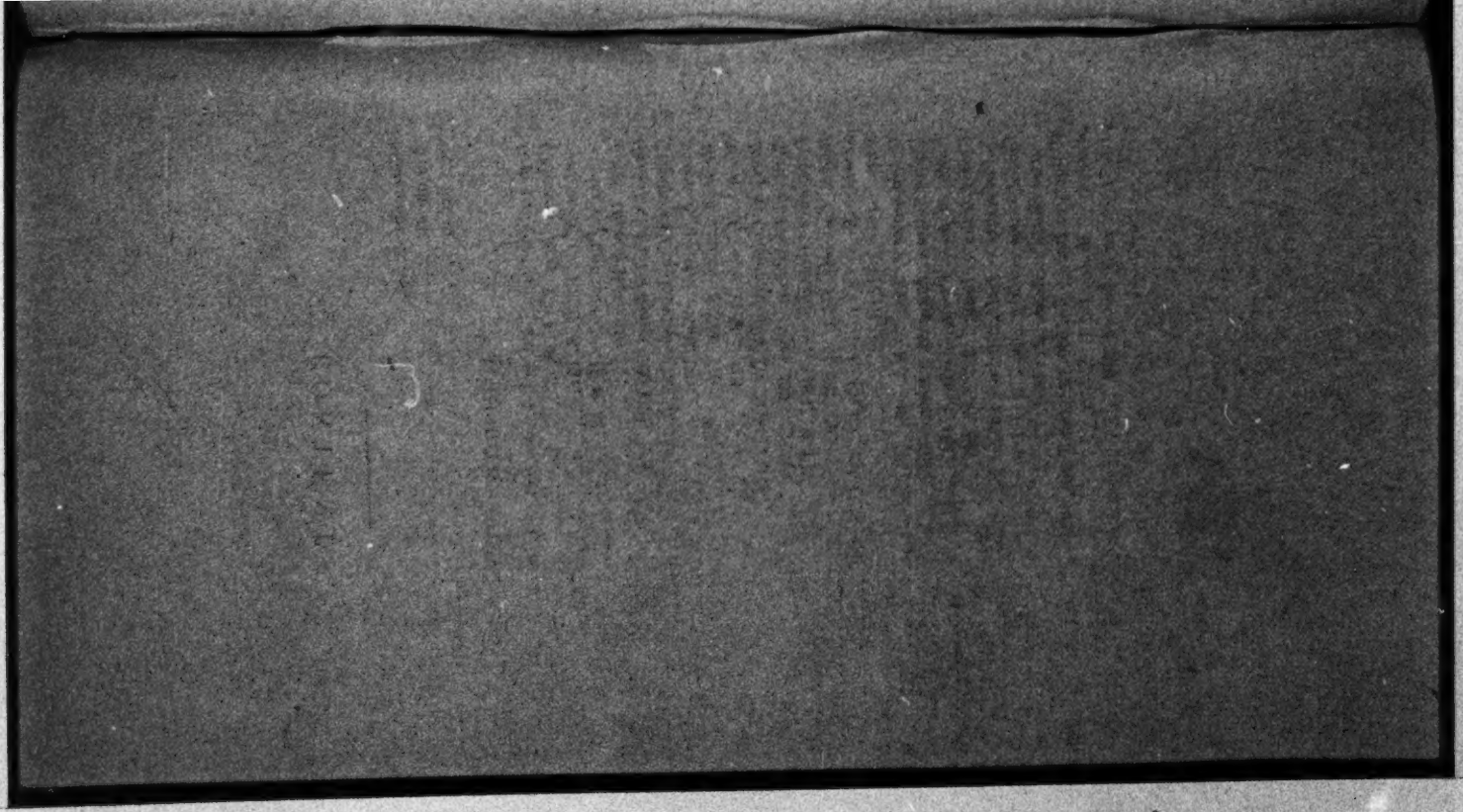

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, PLAINTIFF in error, v. VITO LANZA ET AL. } No. 89.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

The defendants in error, hereinafter called the defendants, were on May 3, 1920, indicted in the United States District Court for the Western District of Washington for violation of the Volstead Act. The indictment contains ten counts, but we are concerned here with the first five counts only.

Count 1 charges the defendants with manufacturing, count 2 with transporting, and count 3 with possessing certain intoxicating liquor. Counts 4 and 5 charge the defendants with possessing a still and material designed for the manufacture of intoxicating liquor (pp. 1, 2, 3).

To these counts of the indictment the defendants filed a plea in bar (p. 19) alleging that prior to the finding of the indictment they had been charged in the Superior Court of Whatcom County, Washington, with having in their possession the same intoxicating liquor and with the illegal manufacture of the same liquor, and that the transactions in Whatcom County, in which they were convicted, were the same transactions that are set forth in the indictment in the United States court; that judgment was entered against them in the State court, and that fines amounting to $750 each and costs were imposed, which they paid; and they prayed that their convictions in the State court be held a bar to the first 5 counts of the indictment.

To this plea the United States demurred (p. 20); the district judge sustained the demurrer and dismissed the first 5 counts of the indictment, and the United States sued out a writ of error assigning as errors, in substance, that the court erred in holding that the matters and things set forth in the special plea in bar recited facts sufficient in law to constitute a defense to the offenses charged in counts 1, 2, 3, 4, and 5 of the indictment, and in overruling the demurrer and sustaining the plea.

The point involved in the case is, therefore, whether a conviction in a State court for violating a State prohibition law is a bar to a subsequent conviction in the United States courts for violating the Volstead Act, when the facts constituting the crime are the same in both cases.

ARGUMENT.

I.

The same act may be an offense both against the State and also against the United States, and if so, each has the power to punish it, and punishment by one is not a bar to punishment by the other.

This double responsibility of the citizen arises out of our dual form of Government. The American is a citizen of two sovereignties, each of which from the beginning has certain exclusive powers and both of which from the beginning have had concurrent powers. The American owes allegiance to the laws both of his State and of his Nation, and by the same act he may offend the laws of both. It would in effect be a denial of Federal sovereignty to hold that where the citizen has been punished for his violation of the laws of the State that he is no longer punishable if the same act constitutes a violation of the laws of the Nation. Prior to the Constitution every State had complete police power over its citizens and only parted with such power to the extent that by the Constitution it divested itself wholly of such power. As was said in the case of *Reid* v. *Colorado*, 187 U. S. 137:

> It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said, and the principle has often been reaffirmed, that "in the application of this principle of supremacy of an act of Congress

in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 Howard, 227, 243.

If it were held as a fixed and binding principle that the citizen who by the same act breaks the laws both of his State and Nation was only punishable by one of the two sovereigns, then there would result a very substantial negation of the dual authority thus granted. Apart from the differences in spirit with which criminal laws may be administered by State and Nation the sanction and vitality of the criminal law lies in the penalty and it is quite obvious that State and Nation may widely and quite naturally differ as to the character of such sanction. We say "naturally," for either State or Nation in imposing penalties for the infraction of its laws might well take into account in prescribing the quantum of punishment the fact that the citizen had also incurred a liability to fine and imprisonment under the laws of the other sovereign. Take, for example, the prohibition laws of State or Nation. The State, taking into consideration the more drastic and far-reaching penalties of the Federal law, might content itself with imposing small or even nominal fines, and, as a State is more likely to become aware of crimes against its localities than the Nation, it would follow, if the appellees' contention is correct, that the imposing of a small fine would divest the Federal Government of

the power to punish the act with a more substantial and effective penalty. As the sentiment for the enforcement of prohibition laws is believed to be inactive in some States, especially in some subdivisions thereof, it would thus follow that the State courts would virtually become in some localities "cities of refuge," as in the old Hebraic law, or sanctuaries, as in the case of medieval church law, from the effective action of the Federal Government. The nominal fines of a local magistrate, perhaps only a justice of the peace, might become the bootlegger's "benefit of clergy."

Happily there is no sanction in the accepted principles of our jurisprudence for any such nullification of the eighteenth amendment. That amendment specifically provides that both State and Nation with respect to the unlawful possession or sale of liquor should have "concurrent power *to enforce*" the general policy of prohibition. The court will observe the use of the italicised words. How are laws, and especially criminal laws, enforced except through the sanction of penalties, and if so, how could it be truly said that both State and Nation practically enjoyed concurrent power to enforce the policy of prohibition if the punishment imposed by a local magistrate *ipso facto* tied the hands of the Federal Government in the enforcement of a policy which it had deemed of sufficient importance to the public weal to make an amendment to the Constitution? Concurrent power "to enforce" must mean that both State and Nation have the power to pro-

hibit the unlawful liquor traffic in all its forms, and when a citizen by the same act violates the laws of both his State and his Nation, he is liable to the penalties which each has prescribed for the violation of its laws.

This principle was early recognized in the history of the United States under the Constitution; it has frequently been applied, and was, at the time of the adoption of the eighteenth amendment, firmly established.

Fox v. *Ohio*, 5 How. 410.
U. S. v. *Marigold*, 9 How. 560.
Moore v. *Illinois*, 14 How. 13.
U. S. v. *Amy*, 14 Md. 149, 152.
Ex. parte Lange, 18 Wall. 201.
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State v. *Pike*, 15 N. H. 88.
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Bishop, New Crim. Law. Vol. 1, secs. 983, 984, 986.
Grigsby's Crim. Law. (1922) Sec. 199, p. 168.

In *Cross* v. *State of North Carolina*, 132 U. S. 131, Cross had been convicted in the courts of North Carolina of forgery, and he appealed to this court upon the ground that the acts, for which he had been convicted, were committed by him as an officer of a national bank and were a violation of the act of Congress covering such offenses, and therefore not punishable by the State. This contention was overruled and his conviction affirmed. Mr. Justice Harlan in delivering the opinion of the court said:

In *Moore* v. *Illinois*, 14 How. 13, this court, by Mr. Justice Grier, said:

> An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, can not be doubted. Yet it can not be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly

punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox* v. *The State of Ohio*, 5 How. 432, that a State may punish the offense of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and in the case of *The United States* v. *Marigold*, 9 How. 560, that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States.

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> The argument in behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each Government. This doctrine is illustrated in *United States* v. *Marigold*, 9 How. 560, 569; *Fox* v. *Ohio*, 5 How. 410, 433; *Moore* v. *Illinois*, 14 How. 13, 19; and *Ex parte Siebold*, 100 U. S. 371, 390; in the first of which cases it was said that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal Governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. (p. 139.)

The *Cross* case has been frequently cited. *Pettibone* v. *United States*, 148 U. S. 195; *In re Chapman*, 166 U. S. 672; *Crosley* v. *California*, 168 U. S. 641; *Southern Railroad Company* v. *Railroad Commission of Indiana*, 236 U. S. 439. In the latter case, Mr. Justice Lamar, in delivering the opinion of the court, said:

> The defendant in error insists, however, that the railroad company was also liable for the penalty imposed by the Indiana statute. In support of this position numerous cases are cited which, like *Cross* v. *North Carolina*, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not

> prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. (p. 445.)

Such, precisely, is the case which we have here, an act over which both sovereignties have jurisdiction. While the detailed scope of the Eighteenth Amendment may not have been fully defined, it is certain that it did not take from a State any right it had before to *prohibit*, nor did it withhold from the United States or the States the right to "enforce" prohibition within a State. What has already been decided shows that the Amendment means at least that the making of intoxicating liquor is prohibited throughout the entire territorial limits of the United States; that the "concurrent power" to enforce is not a *joint* power, but rather a *several* power; that State statutes tending to make prohibition effective are valid and enforceable, and that the Volstead Act applies to intrastate transactions.

> *National Prohibition cases*, 253 U. S. 350.
> *Vigliotti* v. *Commonwealth of Pennsylvania* (No. 580, October term, 1921, decided April 10, 1922).

In the *National Prohibition cases*, 253 U. S. 350, this court announced seven conclusions with respect to the meaning of the Eighteenth Amendment. Among them were the following:

6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a State legislature, or by a Territorial assembly—which authorizes or sanctions what the section prohibits. (P. 386.)

* * * * *

8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs (p. 387).

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transaction as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them (p. 387).

That the power of Congress to enforce the Eighteenth Amendment is not exclusive and that the second section enables the States to enforce it by appropriate means is emphasized by the language

of Chief Justice White, in his concurring opinion, where he said on page 391:

> In the third place, when the second section of the Amendment is considered with these truths in mind it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States without reference to State lines or the distinctions between State and Federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and State administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative.

Concerning any practical difficulties that may arise in the dual system of government, in the case of *Wedding* v. *Meyler*, 192 U. S. 573, which involved a grant of concurrent jurisdiction over the Ohio River, Mr. Justice Holmes, on page 585, said:

> The conveniences and inconveniences of concurrent jurisdiction both are obvious and do not need to be stated. We have nothing to do with them when the lawmaking power has spoken.

It is quite apparent that the eighteenth amendment did not deprive the United States of any power which it had before; on the contrary, it increased its powers. The State had before the amendment the right to make and enforce prohibition laws, and it is quite apparent that that right has also not been taken away. The only thing of which the State has been deprived is its former right to *permit* the manufacture and use of liquor, and thus nullify the amendment. As long as its laws are appropriate to *prohibit* they are valid and enforceable. A violation of them is, therefore, an offense against the State.

In *Vigliotti* v. *Commonwealth of Pennsylvania* (No. 530, October term, 1921, decided April 10, 1922), this court sustained a conviction by a court of Pennsylvania for a violation of a law of that State against the sale of spirituous liquor. The defendant in that case claimed that the State law as applied deprived him of rights guaranteed by the Federal Constitution because the sales complained of had been made after the Eighteenth Amendment became effective, after which the Volstead Act was the only law applicable to sale of intoxicating liquor. The opinion of the court was delivered by Mr. Justice Brandeis, who said in part:

> The Brooks law as thus construed does not purport to authorize or sanction anything which the Eighteenth Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which

the State supplies in the effort to make prohibition effective. That the State may by appropriate legislation exercise its police power to that end was expressly provided in section 2 of the Amendment which declares that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." *National Prohibition cases*, 253 U. S. 350, 387. That the Brooks law as construed is appropriate legislation is likewise clear. To prohibit every sale of spirituous liquors except by licensed persons may certainly aid in preventing sales for beverage purposes of liquor containing as much as one-half of one per cent of alcohol, and that is what the Volstead Act prohibits. If the Brooks law as construed had been enacted the day after the adoption of the amendment, it would obviously have been "appropriate legislation." It is not less so because it was already in existence.

It is true that the precise question in the case at bar was not passed upon by this court in the *Vigliotti Case*, but can it be seriously contended that when this court sustained the power of the State of Pennsylvania to impose punishment for a violation of its liquor license law that it regarded as a necessary implication of such decision that the Federal Government, notwithstanding the Eighteenth Amendment and the Volstead Act, was thereby automatically divested of any power to punish the defendant in that case for his equal violation of the law of the Nation? If the Federal law and the State law with

reference to a specific act were precisely the same and imposed the same punishment for violation, a question of construction might then arise as to whether the *intent* of those laws might not be that the punishment, having been inflicted by one of the two sovereigns, it was sufficient for the purpose of law enforcement. There is, however, no identity of legislation as was shown in the *Vigliotti case*. The Pennsylvania liquor law, while in harmony with the policy of the Eighteenth Amendment, was broader in its scope. Moreover, its penalties and those of the Volstead law are not the same, or even if they were, nearly all penal laws prescribe a minimum and maximum punishment and leave to the discretion of the courts, both State and Federal, the precise nature of the punishment.

Identity of both prohibition and penalty being thus nonexistent, far from there being an implication that it was the intent of either State or Nation that one punishment should suffice, the very differences above referred to suggest the contrary implication that each remedy was independent but not exclusive of the other.

In the lower Federal courts the only opinion holding that a conviction in the State courts is a bar to a prosecution under the National Prohibition Act is that in the present case reported *sub nom*, *United States* v. *Peterson*, 268 Fed. 864. All of the other decisions of the lower Federal courts which have come to our attention are to the contrary. (See *United States* v. *Holt*, 270 Fed. 689; *United States* v.

Boston, 273 Fed. 535; *United States* v. *Regan*, 273 Fed. 727; *United States* v. *Ratagczak*, 275 Fed. 558.)

The following language of Judge Ervin in *United States* v. *Boston*, 273 Fed., at page 538, seems worthy of particular attention:

> In addition to the views so well expressed by Judge Woodrough, and what has been said heretofore in this opinion, it occurs to me that something further might be said as to the meaning of the Fifth Amendment of the Constitution of the United States:
>
> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."
>
> What meaning shall be given the words "the same offense"? How shall they be construed? If the Congress can pass legislation to enforce the Prohibition Amendment, and the states may also do so, it is manifest that such legislative acts will differ—that different laws will be provided for the enforcement of the amendment, and different punishments will be imposed. It is also manifest that often the same act or transaction will violate both the federal and state provisions, so the question arises: Where the same act violates both statutes, has there been only one or more offenses committed? It will be conceded that the offender can not be tried in the federal court for violation of the state statute, nor in the state court for the violation of the federal statute, so it appears that the offense is not the act or transaction alone, but that the act or transaction must be

considered in the light of the legislative provisions and prohibitions.

In the absence of such legislative prohibitions, the act or transaction committed would not be an offense. It is not the prohibited act, but the terms of the statute, which declares and defines the offense. It seems to me, therefore, that as each legislative entity, whether state or federal, declares its own offense, this cannot be the same offense as that provided by the other, though the same act or transaction may violate each of them, but that there are as many offenses as the legislative provisions may declare. (Italics ours.)

The view thus expressed by Judge Ervin seems to be in accord with the rule laid down in *Morey* v. *Commonwealth*, 108 Mass. 433, and adopted by this court in *Gavieres* v. *United States*, 220 U. S. 338, 342, *et seq.* It is true that in the *Gavieres case* this court was considering the meaning of the word "offense" in the Fifth Amendment and the Philippine Organic Act in connection with charges instituted by the same sovereignty upon the same facts; while, in so far as the present argument is concerned, the question is as to the construction of the word "offense" as to prosecutions by different sovereignties. Nevertheless, Judge Ervin's view that prosecutions under State prohibition laws must necessarily be for different "offenses" from prosecutions under the National Prohibition Act, even since the Eighteenth Amendment, seems sound.

In this connection, the obvious motive for adding section 2 to the Eighteenth Amendment should be borne in mind. When the amendment was adopted, over thirty of the forty-eight States of the Federal Union already had absolutely prohibited the liquor traffic, and all of them had in some measure restrained it. To them, such prohibition was not an experiment. The opposition to a Federal amendment was very great, and it may have been doubted by many whether, if a nation-wide prohibitory amendment was added to the Federal Constitution, it would be enforced with appropriate vigor. Therefore the concurring States, investing in the Federal Government a nation-wide power to prohibit the liquor traffic, which, if there had been no section 2, might have been construed as nullifying by exclusive power the prohibitory laws of the States, were careful to provide that the new Federal power should not abrogate the powers of the States which were directed to the same general end, but that the Nation *and* the States should severally have "concurring power to enforce" the policy of prohibition. However, the States, while thus reserving their existing powers to enforce the policy of prohibition, nevertheless preferred to give a concurring power to the Federal Government to do so, and it was evidently hoped—although the event has not wholly justified the hope—that the concurring pressure of both State and Nation would make the difficult policy of prohibition fully effective.

Such being the point of view, it is wholly improbable that the concurring States, in thus attempting to

give a double effectiveness to the policy of prohibition, should have intended so easy a method of escape to the bootlegger from nation-wide Federal power as the contention in the case at bar. In other words, they could not have meant, when they made this momentous alteration in the character of the Federal Constitution, that a punishment by State officials for an act, which was an equal offense against the Federal laws, should paralyze Federal activity and prevent the Federal Government from adequately enforcing its laws. What the concurring States wanted was effective nation-wide prohibition, enforced by the Federal Government through its courts, and by the States through their courts, respectively, and while each such State reserved the power to punish its own citizens, it never intended, in so doing, to strip nation-wide prohibition of its efficacy.

We are not unmindful of some general expressions by courts and text writers to the effect that it is contrary to the spirit of our institutions, indeed to the common principles of humanity, that a man should be punished for the same act by two governments. In *Fox* v. *Ohio*, 5 How. 410, Mr. Justice Daniel wrote:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and Federal system are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for facts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraor-

> dinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration (p. 435).

In the same case, Mr. Justice McLean in a dissenting opinion, after stating that the point was "Whether the other may inflict by virtue of its own sovereignty punishment for the same act as an offense against the State, which the Federal Government may constitutionally punish," said:

> If this be so, it is a great defect in our system. For the punishment under the State law would be no bar to a prosecution under the law of Congress. And to punish the same act by the two Governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both Governments. If there were a concurrent power in both Governments to punish the same act, a conviction under the law of either could be pleaded in bar to a prosecution by the other. But it is not pretended that the conviction of Malinda Fox, under the State law, is a bar to a prosecution under the law of Congress.

Similar language has been used by writers upon international law with respect to such crimes as piracy on the high seas, which have always been regarded as crimes against all civilized nations and punishable by any one. See *U. S.* v. *Pirates*, 5 Wheat.

184, 197. See also *U. S.* v. *Amy*, 14 Md. 149, 152, quoting an opinion of Chief Justice Taney at Circuit.

These considerations, however, involve questions of discretion, not of power. It may well be that upon the trial of the defendants in this case, should they be convicted, the trial judge in imposing sentence would feel it to be his duty to take into consideration the punishment already inflicted by the State court, but it would be unfortunate if this court should deny to the courts of the United States the right to try defendants for violating the Volstead Act if they had already been tried in State courts. As we have already argued (*Ante*, p. 4), this would almost inevitably result in partial nullification of the Eighteenth Amendment in any jurisdiction where it and the Volstead Act were not regarded with favor by local officials. The concurrent jurisdiction to enforce, granted by the Amendment, might thus result in doing what Chief Justice White described as "frustrating the first section by a construction affixed to the second," 253 U. S. 390.

Mr. Justice Daniel, in *Fox* v. *Ohio*, *supra*, referring to the benignant spirit of our institutions, anticipated cases of "peculiar enormity" or "where the public safety demanded extraordinary rigor." While the manufacture of a small quantity of wine, and the possession of a still of modest capacity may not impress the average mind as an offense of peculiar enormity requiring extraordinary rigor to preserve the public safety, nevertheless it must be remembered that the eighteenth amendment represents an extraordinary manifestation of the popular will, and the

Volstead Act is a declaration by Congress of its desire to enforce by its own laws that amendment with exceptional rigor.

As was said by Mr. Justice McKenna, 253 U. S. 397:

> It is to be remembered that the Eighteenth Amendment was intended to deal with a condition, not a theory, and one demanding something more than exhortation and precept. The habits of a people were to be changed, large business interests were to be disturbed, and it was considered that the change and disturbance could only be effected by punitive and repressive legislation.

From a constitutional standpoint, the liquor traffic and slavery are equally outlawed. The liquor itself for beverage purposes is contraband, in the same class with burglar's tools, counterfeit money, and gambling apparatus. The place where it is made or where it is kept is, as matter of law, a nuisance, like a disorderly house or a gambling den. The growth of the sentiment which resulted in the Amendment is the most remarkable social movement culminating in political action which this country has seen since antislavery days.

These considerations would not seem to justify the court in holding that the double right to punish by the State and by the Nation, which has become firmly established in connection with such crimes as counterfeiting, forgery, and larceny, and which is specifically provided for in the "concurrent power to enforce" should be denied in prohibition cases.

That the acts committed by the defendants involve two distinct offenses, one against the State and one against the Nation, different in their respective aspects and consequences, is plain. The illicit making of intoxicating liquor is primarily an offense against the people of the community where it is made, imperiling the sobriety of that community, and in another and broader sense, it is an offense against the people of the United States, because that liquor may find its way into interstate or even foreign commerce and thus tend to nullify the amendment in a larger way. In this particular case, this larger danger is comparatively remote, for the quantity of liquor was small but the principle is the same as it would be in the case of a large distillery where local sentiment might be satisfied with the infliction of a series of trivial fines, amounting in effect to a continuing license, and if those fines were held to be a bar against Federal prosecution, that distillery might become a menace to communities and States, far removed from the local influences.

CONCLUSION.

The judgment of the district court should be reversed, and the demurrer to the plea of the defendants sustained.

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SEPTEMBER, 1923.

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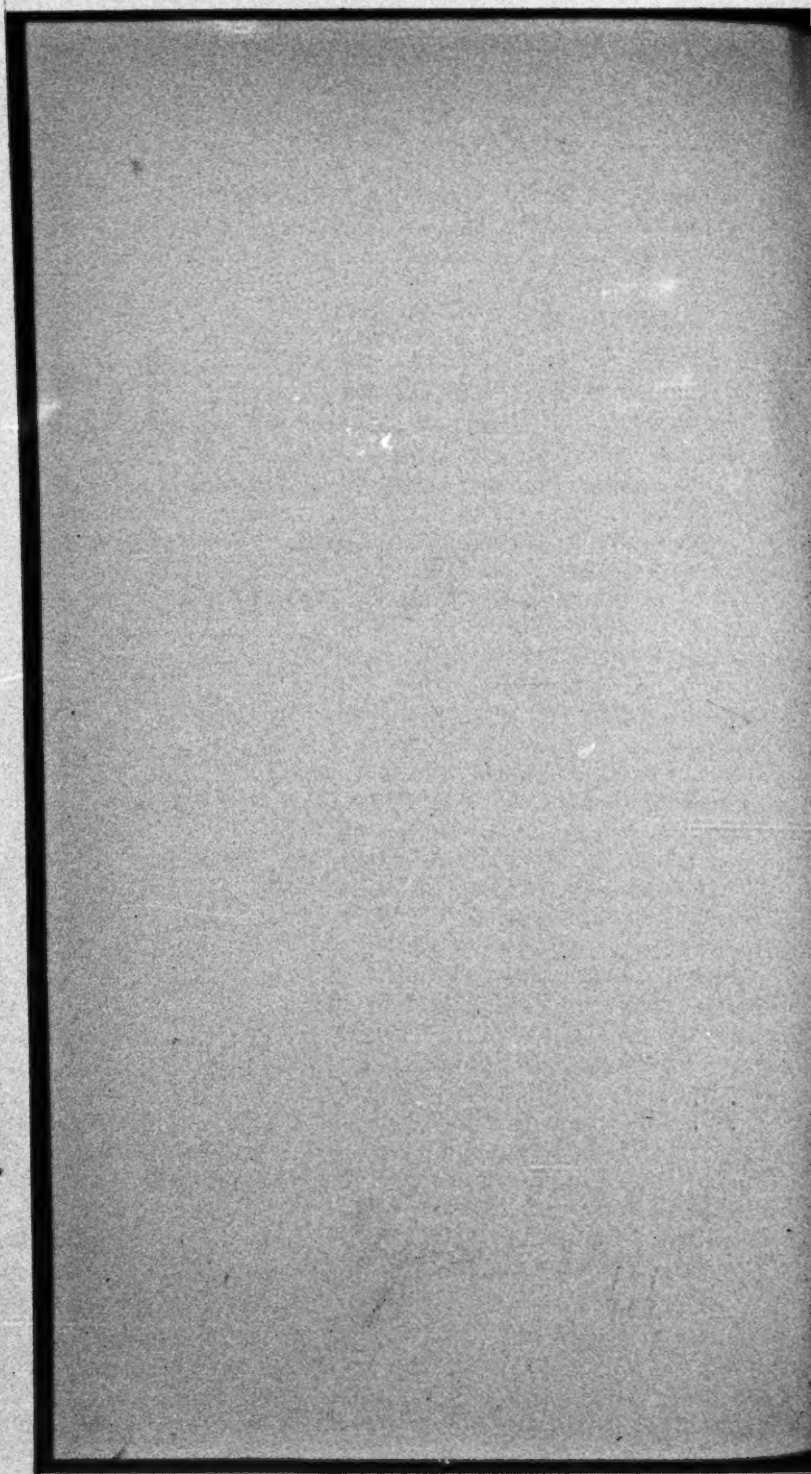


In the Supreme Court of the United States

OCTOBER TERM, 1922

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

VITO LANZA, DICK BARTO, ET AL

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE DEFENDANTS IN ERROR

STATEMENT OF CASE.

The point involved in this case, and the only point, is correctly stated by the government on page two of its brief, wherein it is stated: "The point involved in this case is, therefore, whether a conviction in a state court for violating the state prohibition law is a bar to a subsequent conviction in the United States Court for violating the Volstead Act, when the facts constituting the crime are the same in both cases."

ARGUMENT.

At the outset, the situation that compels a solution of the question herein is one heretofore unknown to federal procedure. Little aid can be secured from past decisions. The 18th Amendment gives rise to a condition heretofore unknown. It is the only provision in the Constitution that attempts to deal with a parochial matter. Prior to the adoption of the Amendment, the control of the liquor traffic was a matter that, in all states, was regulated more or less by the states, although, in an ever increasing number of states, there was a tendency, as exemplified in local option, to confer the regulatory power upon as minute political subdivisions as possible.

The 18th Amendment, Section 1, declares the law for the nation. In *Rhode Island vs. Palmer*, 253 U. S. 350; 40 Supreme Court 486; 64 Law Edition 946, there are the following conclusions:

> "6. The first section of the Amendment, the one embodying the prohibition, is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a State legislature or by a Territorial assembly, which authorizes or sanctions what the section prohibits.

7. The second section of the Amendment, the one declaring 'the Congress and the several States shall have concurrent power to enforce this article by appropriate legislation,' does not enable Congress or the several States to defeat or thwart prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them, nor do they mean that the power to enforce is divided between Congress and the several States along lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions, as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them."

The 8th Conclusion disposes of any contention that concurrent power means joint power, or that the approval or sanction of the states is necessary to render effective the action of Congress, or that there is any division of power between Congress and the several states. If this Honorable Court is to adhere to this conclusion, there is still nothing in it that supports the government's contention that the National Prohibition Act and legislation of

states appropriate to enforce the constitutional amendment are within the doctrine that the same act may be an offense both against the State and against the United States, and if so, each has the power to punish, and punishment by one is not a bar to punishment by the other. An examination of the cases that give rise to this doctrine will show that they did arise in cases where there was a division of power to enforce between Congress and the several states along lines which separate or distinguish foreign and interstate commerce from intrastate affairs. In other words, this 8th Conclusion places the National Prohibition Act in a different class, whatever that class may be, than the legislation that gave birth to the doctrine contended for by the government.

From a practical standpoint, the doctrine contended for by the government has rarely been invoked. The truth of the matter was that until the passage of the 18th Amendment, penal legislation of Congress and penal legislation of the states rarely covered the same acts. A few cases, of course, may be found where the breaking and entry of government buildings were prosecuted under state burglary statutes, and a few cases may be found where the passing of counterfeit money was prose-

cuted under a statute against cheats or obtaining money under false pretenses. And a case, too, may be found where an extortion charge was based upon a malicious and wrongful threat to prosecute one in the Federal Court for the violation of a federal statute, and by such a threat, money had been obtained in the confines of the state.

In this case, the question that must be answered is: Does Section 2 of the 18th Amendment, reading that "Congress and the several states shall have concurrent power to enforce this article by appropriate legislation," convey the intention on the part of Congress that selected the language for the amendment which they proposed for adoption, evince an intention that a person who does an act that is a violation of the National Prohibition Act may, after having been convicted in a municipal court, in a state court, can again be convicted a third time for the same act in a Federal court? Or, does not the knowledge necessarily possessed by Congress at the time the Amendment was proposed that a large majority of the states covered with penal legislation every act that Congress sought to cover, evince an intention that the court that first got jurisdiction of a person should exhaust that jurisdiction to the exclusion of the Federal and State court, as one or the other first obtains jurisdiction?

The prosecution of an individual in a State court, then, after he has satisfied the judgment of that court, his apprehension and prosecution in a Federal court, however abhorrent it may be to all sense of natural justice, yet is not difficult of accomplishment. The National Prohibition Act, however, provides besides penalties of imprisonment and fines upon the individual, civil process for the confiscation of automobiles and other vehicles seized while transporting intoxicating liquor. Provision is made for the sale of the vehicle, the proceeds to belong to the Federal government. Such seizure is provided for in Section 26 of the National Prohibition Act. Such legislation was not original with Congress. It is found in many of the state statutes. That such legislation exists in various states may be seen by an examination of the following:

Maples vs. State, (Ala.), 82 So. 183;
State vs. Jenson, (Utah), 184 Pac. 179;
One Cadillac Automobile vs. State, (Okla), 182 Pac. 227;
Van Bug Fish Co. vs. Herstrom, (Wash.), 177 Pac. 334;
Everett vs. McCulloch, 102 Wash. 51, 172 Pac. 863.

If liquor is being transported in an automobile in any of these various states that have exactly the same provision for the seizure of automobiles as

the National Prohibition Act, and the automobile is seized concurrently on the process of a United States Commissioner and a Justice of the Peace, or without process is seized by State and Federal officers, which of the two courts, the Federal or the State, has the right to condemn the automobile and sell it, and which has the right to the proceeds? The answer surely cannot be that Congress intended that there should be an indecent and unseemly scramble between the State and Federal Courts to obtain the proceeds from the confiscation of vehicles. The only answer must be that Congress, knowing in passing the Prohibition Act that it was duplicating state legislation, and it is difficult to find in it any provision that cannot be duplicated in the liquor legislation then and now existing in one or more of the states, it was the intention of Congress, as it relates to the seizure provisions of the Act, that whichever one of the courts, State or Federal, first exercised its jurisdiction, should exercise it to the exclusion of the other court.

The same may be said of provisions providing for injunctive relief, abating nuisances, such as provided for by Sections 21, 22, 23 and 24 of the National Prohibition Act. These provisions are found in many of the states. Iowa, North Dakota,

Maine, West Virginia, Oregon and Washington are a few of the states that have provisions identical in substance. Was it the intention that a person whose building was being maintained as a place for the sale of liquor should be subjected to injunctive proceedings, both in the State court and in the Federal court, and, if so, was it the intention he should be punished for contempt in both courts for the same act? The only answer that is consonant with common sense is that Congress knowing that they were reenacting the same legislation as existed in the various states, contemplated that the court first obtaining jurisdiction should exercise it to the exclusion of the other, both as to person and subject matter, and that this would be the interpretation placed upon the words "concurrent power" by the courts.

That such was once the hope of the government itself is found by the note appended to Justice McKenna's dissenting decision, *Rhode Island vs. Palmer, supra,* wherein it is said:

> "The government feels the inconsistency of its concessions and recessions. It asserts at one instance that the legislation of the states may be enforced in their courts, but in the next instant asserts that the conviction or acquittal of an offender there will not bar his prosecution in the Federal courts for the same act as a

violation of the Federal law. From this situation the government hopes that there will be rescue by giving the 18th Amendment 'such meaning that the prosecution in the courts of one government may be held to bar a prosecution for the same offense in the courts of the other.' The government considers, however, the question is not now presented."

The discussion that took place during the debate in the House throws some light on the meaning placed by its proponents upon the Amendment. The question was propounded by Mr. Dewalt to Mr. Webb, chairman of the Judiciary Committee having the bill in charge:

> "Suppose that (state) law was not in conformance with the regulation as passed by Congress, for the enforcement of this provision, having, as you say, for this clause, concurrent power. Which of the two powers would be supreme, if any?"

To which Mr. Webb replied:

> "The one getting jurisdiction first, because both powers would be supreme, and one supreme power would have no right to take the case away from another supreme power. Both powers are supreme to enforce this article, and the first getting jurisdiction would enforce it."
>
> *56 Congressional Record,* part 1, page 424.

Mr. Cannon of Illinois propounded the further question:

> "If the gentleman will allow me, under the police powers of the state, every state can

prohibit within its boundaries the manufacture and sale."

To which Mr. Webb replied:

"Indeed, within its boundaries. That is what we want to permit them to continue to do. We do not want ten thousand federal officers and all the expenses of salary going over the country and enforcing these laws when the states have their own officers to do so and are willing to do so."

56 Congressional Record, part 1, page 464.

The government overlooks the fact that the situation which arises here is not analagous to that in which the government may prosecute one for circulating counterfeit money and the state may prosecute one for obtaining property under false pretenses by the use of the passage of counterfeit money. In the federal counterfeiting charge and the state cheating charge, the state is not attempting to enforce any article or amendment to the Constitution of the United States. Congress is, of course, passing legislation to protect the coinage of the United States with powers conferred upon it by the Constitution. The state is not passing any law to protect the coinage. It is passing a law to prevent frauds practised upon its citizens, regardless of whether by means of words, writing or coin.

In Article 2 of the 18th Amendment, Congress, with knowledge that it was for the first time in history passing a piece of legislation that section by section, page by page, duplicated the legislation of many, if not the majority, of states, and realizing the purpose was to prohibit the identical things that have been prohibited in a majority of the states, must have felt that it would be compelled, in passing the legislation, to rely upon the same penal prohibition as the states had, in their experience, found necessary, and when the National Prohibition Act came to be passed, and as it exists in its present form, section by section, it is identical with many, if not all, of the legislation in prohibition states. It is hard to believe that Congress ever intended that a person should be tried in every court that was open for the doing of a petty act such as selling a bottle of whiskey or transporting a case of whiskey. The penalties that Congress attached to the doing of the acts prohibited by the National Prohibition Act show that the offenses there denounced were not looked upon with any great abhorrence. The systems of fines and imprisonments provided in the National Prohibition Act nowhere exceed those prescribed by the prohibitory legislation of the various states, and in most cases they are identical, and

where they differ, those in the National Prohibition Act are less.

The government in its brief speaks of a bootlegger escaping the severe penalties imposed by the Federal government by being subjected in the first place to the jurisdiction of a state court. An examination of Remington's Code, 6262-1, as amended by the Session Laws of 1917, and as further amended by the Session Laws of 1921, Chapter 122, shows that the legislation to which the defendant in this instance was subjected was far more drastic, both in its provisions and in its penalty than the National Prohibition Act. In fact, the legislation of the State of Washington is what is known as of the "bone-dry" type. The possession of liquor for even medicinal purposes is prohibited to all persons, the only exception being that druggists, hospitals and sanitariums may possess alcohol, and that doctors may prescribe alcohol. Even the prescribing of whiskey or beer, or the giving of the same in a hospital by a regularly licensed physician is prohibited. The drastic character of the legislation may be well summarized by a comparison of Section 21, wherein the penalty provided for liquor nuisances, a fine of $1,000 or imprisonment for not more than one year, or both, and the provision of the Session Laws of

1917, Chapter 19, that any person who opens up, conducts, or maintains, either as principal or agent, any place for the unlawful sale of intoxicating liquor, shall be deemed guilty of a felony, and be punished by imprisonment for not less than one year or more than five years.

Congress must have known that nothing could bring the policy of national prohibition into greater disrepute and contempt than to have a system under which a person paying a penalty for the possession of a quart of liquor in a prosecution commenced in a state court and upon the completion of the same could be prosecuted in the Federal court for the same act. This court should not establish such a precedent if there is any escape from it. If this court were shackled by precedent, and if the condition and the legislation were not unique, there might be some compulsion to establish such a precedent; but the decent thing, the thing that will make for at least a semblance of respect for the National Prohibition Act, is to hold as the trial court held in this instant case, that a conviction in a state court is a bar to prosecution for the same act in a Federal court.

This court, it is true, has held that the first section of the Amendment, the one embodying the

prohibition, has operated through the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within its limits, and of its own force invalidates every legislative act, whether by Congress or state legislature, or by territorial assembly, which authorizes or sanctions what the section prohibits. And, it is also true that in *Vigliotti vs. Commonwealth of Pennsylvania*, No. 530, October term 1921, decided April 10, 1922, 42 Sup. Ct. Rep. 330, this court has held that the Brooks Act prohibiting the sale of spirituous liquors without a license is appropriate legislation to enforce the 18th Amendment. There is nothing in this decision, however, that sanctions this double prosecution. It must be borne in mind that none of the cases cited by the government involves consideration of delegated powers to be exercised concurrently. None of the cases has any controlling power. They may be of value by comparison only.

The government, in relying upon the cases cited, has an idea that where Congress and the states have heretofore had concurrent power, that the situation was analagous to that of the National Prohibition Act and the State Prohibition Act. That this is not true was announced in *Gilbert vs. Minnesota*, 254 U. S. 325; 41 Sup. Ct. 125, wherein Justice Brandeis says:

"This will be true, even if the subject in question were one over which Congress and the states have concurrent power, for where Congress has occupied a field theretofore open also to state legislation, it necessarily excludes all such."

Southern Ry. vs. Reid, 222 U. S. 424; 32 Sup. Ct. 140; 56 Law Ed. 257;
Chicago, Rock Island & Pac. Ry. vs. Hardwick Farmers Elevator Co., 226 U. S. 426; 33 Sup. Ct. 174; 57 Law Ed. 284; 46 L. R. A., N. S., 203.

This court, however, has committed itself to the doctrine that concurrent power, as used in Section 2 of the 18th Amendment, has incidents different from that power which was formerly described as concurrent. The power that Congress attempted to describe by use of the word "concurrent" in Section 2 is similar to the concurrent jurisdiction existing between states bordering on the same river—over civil and criminal acts committed on the river. In the case of *Neilson vs. Oregon,* 212 U. S. 315, 29 Sup. Ct. 383; 53 Law. Ed. 528, where Oregon and Washington, under an act of Congress, has concurrent jurisdiction, both civil and criminal, of the Columbia River, the Supreme Court of the United States says, where an act is *malum in se,* prohibited and punished by the laws of both states, the first acquiring jurisdiction of the person may

prosecute the offense and its judgment is a finality in both states; so that one convicted or acquitted in the courts of the one state cannot be prosecuted for the same offense in the courts of the other.

The court further says: "Doubtless the same rule would apply if the act were prohibited by each state separately."

Another leading case upon a statute of concurrent jurisdiction is *Roberts vs. Fullerton*, 93 N. W. 1111, holding that prosecution in the courts of one government bars a prosecution for the same offense in the courts of the other. This is where two separate states have concurrent jurisdiction over the same territory. This decision, moreover, is useful for its definition of the word "jurisdiction" when used in conjunction with "concurrent." As the word "jurisdiction" must necessarily mean the power to govern by legislation, so the word "power," used in the 18th Amendment is according to the pleaders herein, synonymous with "jurisdiction."

In *McFall vs. Commonwealth*, 2 Metc. (Ky.) 394, "jurisdiction, as used in the compact (for concurrent jurisdiction), imports nothing more than the power to govern by legislation."

Gardner's Institute, p. 210, cited in *Roberts vs. Fullerton*, 93 N. W. 1115, states:

"In all cases of such jurisdiction, the state first arresting or prosecuting a party is by comity entitled to proceed to final judgment; and that is a bar to any retrial by any other State of our Union for the same cause or offense.

Columbia River Packers' Ass'n vs. McGowan,

172 Fed. at p. 998.

"But as between courts of concurrent jurisdiction, the court that first acquires jurisdiction holds it to the exclusion of all others."

In the case of *State vs. Faudre,* 46 S. E. 271, speaking of concurrent jurisdiction between Kentucky and Indiana over the Ohio River, the court says:

"Jurisdiction unqualified being, as it is, the sovereign authority to make, decide on and execute laws, a concurrence of jurisdiction must entitle Indiana to as much power, legislative, judicial and executive, as that of Kentucky over so much of the Ohio River as flows between them, and consequently neither of them can, consistently with the compact, exercise any authority over their common river, so as to destroy, impair or obstruct the concurrent rights of the other."

Speaking further, the court says:

"The word 'jurisdiction' as here used, must be wide. Why should it be confined to any of the three agencies of jurisdiction, legislative, executive or judicial?"

Jurisdiction means "to apply the law to the acts of man."

Wedding vs. Meyler, 192 U. S. 573.
Wiggins Ferry Co. vs. Reddig, 24 Ill. App. 260.
Iowa vs. Mullen, 35 Iowa 199.
Keaton Lumber Co. vs. St. Croix Boom Co., 38 N. W. 529.

All sustain the doctrine that the court that first takes jurisdiction under a provision of concurrent jurisdiction, exhausts the jurisdiction in that particular prosecution and none is left for the courts of the other states.

> "Where one of two courts of concurrent jurisdiction has taken cognizance of a cause, the other will not entertain jurisdiction of the same cause."
>
> *Bouvier's Law Dict.,* p. 1763.

That the court that first takes control of property excludes action by a court of concurrent jurisdiction, is borne out by a case reported in 208 U. S. 53, wherein it is stated that a 'conflict over the possession of property would be unseemly and subversive of justice."

State vs. Cunningham, Ann. Cases 1914 D 185, supports the doctrine that where states have concurrent jurisdiction over criminal offenses, the prosecution to a finality by one of them bars the other from prosecuting. And this is so, even though the punishments are different.

It is practically impossible, in running through the cases where it is said that both the Federal and the State governments could prosecute for the same act, to escape, upon careful examination of the language of the decisions, that in nearly every case there is some element that is different. In *ex parte* Crookshank, 269 Fed. 980, District Judge Bledsoe realized that some way should be found to bar the double prosecutions and uses the following language:

> "A really interesting query, which, however, need not be determined in the instant case, is whether, under the terms of section 2 of the Eighteenth Amendment and the specific grant of concurrent power to the several states therein, a prior conviction or acquittal in a State or Federal court, the one first obtaining jurisdiction, would not operate as a plea in bar in the other jurisdiction. *Jones vs. Hicks, supra,* 104 S. E. 773, 774. It may be that Congress had that in mind, together with the fact of permitting the several states and the municipalities thereof to derive financial benefit from the collection of fines, etc., when the concurrent power to enforce the amendment was specifically delegated to the states. If the enforcement of prohibition on the part of the state is to be deemed merely an exercise of the power conferred by section 2, then it would seem as if there could not be two prosecutions for the same offense in the different jurisdictions. In that sense, the state would be exerting a power conferred by the Federal government, rather than a power originally belonging to it, and a conviction or acquittal under the Federal law, irrespective of the court in

which it might be had, would operate as a plea in bar. The plea of once in jeopardy—'can surely never be successfully asserted in any instances but those in which jurisdiction is vested in the state courts by statutory provisions of the United States.' *Houston vs. Moore,* 5 Wheat. 1, 35 (5 L. Ed. 19)."

It is not necessary, however, to decide that a principle that forbids a prosecution under the National Prohibition Act and the state liquor law for the same act, comes within the former jeopardy rule; but the power existing between the state and the Federal government over the liquor traffic is more akin to that existing between two states on opposite sides of a river having concurrent power. The principle that prevents prosecution for the same act in both states is not that of former jeopardy, but that of comity. It is even recognized that a criminal act committed on the Great Lakes may be prosecuted either in the courts of the United States or the courts of Canada. The doctrine of comity has always held that a prosecution in the courts of Canada was a bar to a prosecution for the same act in the courts of the United States, and vice versa.

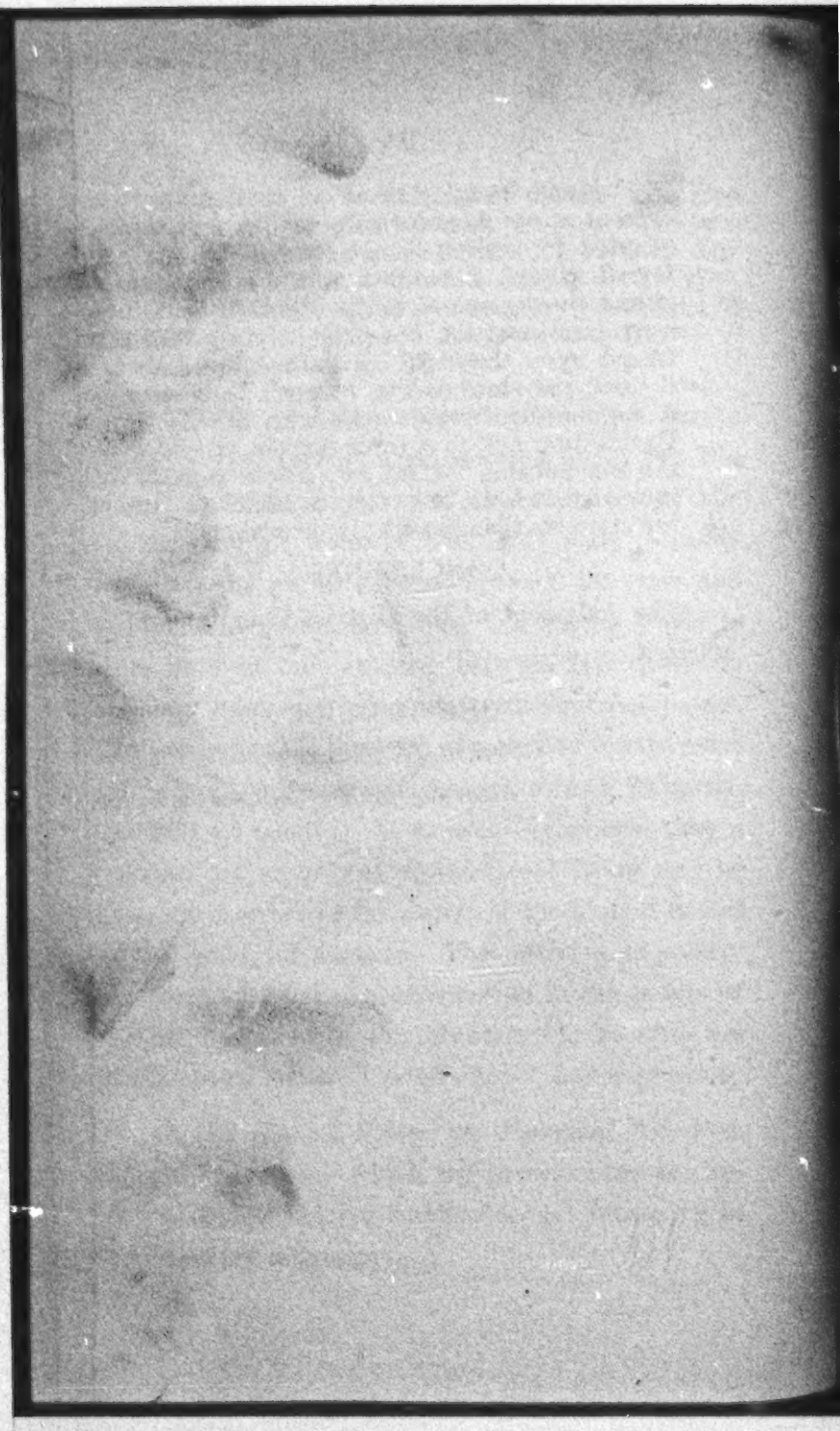
In the *United States vs. Peterson,* 268 Fed. 865, the title under which the present case was reported, Judge Neterer summarizes his reasoning in the following language:

"Much 'bewilderment' is created by 'concurrent power to enforce by proper legislation,' granted by section 2, art. 18. This is a conferred power, not upon courts of the state, giving them concurrent jurisdiction to enforce a congressional act, but primarily a power conferred upon the state legislature, and through it upon the state courts, by such legislation as it may exact in harmony with the National Prohibition Act, to enforce Article 18, and while the amendment 'of its own force repeals' all inconsistent laws, it preserves inviolate laws of the state consistent with its provisions."

CONCLUSION

The judgment of the District Court should be affirmed.

JOHN F. DORE,
Seattle, Washington,
Attorney for Defendants in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, PLAINTIFF in error, v. VITO LANZA ET AL. } No. 39.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

If I correctly understand the argument of the counsel for the defendant in error, he does not question the power of the Federal Government, under the eighteenth amendment, to punish cumulatively a citizen who by the same act has transgressed both the State laws prohibiting the manufacture or traffic in liquor and the national laws. He rests his argument upon the contention that the Federal enforcement statute—the so-called Volstead law—should not be construed to mean that the citizen who has once been punished for the violation of State laws should again be punished for the violation, by the same act, of the Federal laws.

It is enough to say that no section of the Volstead law contains, either expressly or by implication, any

such release of liability. Its only reference to State laws is that no permit should be given to sell liquors for nonbeverage purposes to anyone who has violated National or State laws. If it had been the intention of Congress, in framing the enforcement statutes under the eighteenth amendment, to provide that, while the State courts and the Federal courts had concurrent power, the court which first assumed the duty of enforcement and punishment would have the exclusive right to proceed, the Volstead law would have said so. Counsel for the defendant in error cites no section which can be thus construed.

Undoubtedly, in an *in rem* proceeding, the property once being forfeited, can no longer become a *res* for further forfeiture proceedings; for, when forfeited, it passes beyond the ownership or control of the offender. Therefore, if a State court proceeds to forfeit a distilling apparatus, or any other incident of the business, comity between the State and Federal courts would justify the court which first took jurisdiction in proceeding, and when the forfeiture was decreed no further proceeding could be had *in rem* for the reason that the *res* would then be the property of the State and presumably destroyed. This, however, does not apply to the punishment of the offender himself.

I have already shown by abundant citation of authorities that the cumulative punishment of citizens who violate both State and Federal laws has been a recognized part of our jurisprudence from the beginning of the Government and was never held to be within the jeopardy clause of the Constitution.

Even in the matter of liquor laws, there were always a dual jurisdiction and double liability. For example, the man who sold liquor without complying with either Federal or State laws could be punished by the State for his violation of its prohibitory laws and, at the same time, by the Federal Government for selling liquor without first obtaining a Federal license to do so or complying with such conditions as the Federal law formerly imposed upon the right to sell liquors. Similarly, in the oleomargarine cases, a man could be punished under a State prohibitory law for selling oleomargarine and he could be punished by the Federal courts if he sold it without paying the Government tax or in any other manner that violated the restrictive laws which the Federal Government imposed upon the sale of oleomargarine, as, for example, branding.

It thus being clear that Congress, when it passed the Volstead law, clearly recognized this feature of our dual form of government, it can not be argued that the penalties of the Volstead law can only be enforced provided the State had not previously punished the offender for the same act. I do not say "the same offense" in the language of the jeopardy clause of the Constitution, for a violation of the State law and a violation of the Federal law—however similar in form and purpose—are not the same offense.

In my consistent purpose to file with this court only briefs that are brief in fact as well as in name,

I fear I may have scanted the substantial reasons for holding that the eighteenth amendment may have cumulative as well as concurrent power. The fact is that the States, while always jealous of their power to regulate the liquor traffic, were always, previous to the eighteenth amendment, seeking the aid of the Federal Government to make the policy of prohibition more effective. Thus came the Wilson Act (26 Stat. 313), the Webb-Kenyon Act (37 Stat. 699), the Reed amendment (39 Stat. 1069) and other acts which sought to remove the power of the Federal Government to interfere with the effective power of the State to prohibit the sale of liquor. The fact is that, by the eighteenth amendment, the States, far from divesting themselves of all the power that they once had, were, in effect, largely retaining their previous power under the Federal Constitution and gaining a substantial part of the power which they had formerly vested in the Federal Government by the Constitution. This will be shown by the legislative history of the eighteenth amendment.

The enforcing section as embodied in the original resolution was as follows:

> The Congress shall have power to enforce this article by appropriate legislation, and nothing in this article shall deprive the several States of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors.[1]

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[1] 55 Cong. Rec. 5648.

As amended and passed by the Senate it read as follows:

> The Congress shall have power to enforce this article by appropriate legislation.[2]

And as further amended and passed by the House and concurred in by the Senate, and as ratified by the States, it read as follows:

> The Congress *and the several States* shall have concurrent power to enforce this article by appropriate legislation.[3]

Taking the meaning of the term "concurrent power" to be in doubt the familiar doctrine restated in the recent Wisconsin rate case [4] may be invoked; recourse may be had to committee reports and statements by those in charge of the bill to ascertain its proper construction.

The reports of both the Senate and the House make an inadequate presentation of the matter in regard to the effect of the proposed amendment. The burden of the reports is that, the people of the country being so insistent about it, Congress should submit the proposed amendment to them and thus give them an opportunity to vote on the prohibition question.

Without the statement of any reasons therefor the Senate Committee on the Judiciary, to which

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[2] 55 Cong. Rec. 5664. The committee declared (S. Rept. 53, 65th Cong., first sess.) that the substance of the proposed amendment had been before every Congress since and including the Forty-fourth.

[3] 56 Cong. Rec. 447–475.

[4] *Railroad Commission of Wisconsin* v. *C., B. & Q. Ry.*, 257 U. S. 563.

was referred the original resolution introduced by Senator Sheppard, struck from the enforcing section the words "and nothing in this article shall deprive the several States of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors," leaving the section to read, "the Congress shall have power to enforce this article by appropriate legislation."[5] The effect of this amendment would seem to be plain. The analogy of the thirteenth, fourteenth, and fifteenth amendments, with substantially identical enforcing clauses, would lead to the conclusion that the power would be delegated to Congress—in other words, that the States would be handing over to Congress the problem of suppressing the traffic in intoxicating liquors. True, it was denied on the floor that the amendment would have any such effect and there were extracts in the committee report tending to support that denial. The amendment was passed by the Senate in the form in which it was reported by the committee. Thus the amendment at this stage appeared to involve a surrender of State power to Congress.

But the House declined to accept the amendment as passed by the Senate. Like the Senate committee the House committee disclosed no reasons for their action, but merely reported the proposal amended to read, "the Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."[6] In that form it passed the

[5] S. Rept. No. 52, 65th Cong., 1st sess.
[6] H. Rept. No. 211, 65th Cong., 2d sess.

House, was concurred in by the Senate, and ultimately ratified by the States.

One thing, then, seems clear from the committee reports and action thereon: The amendment refused to surrender the preexisting power of the States to enforce their prohibitory statutes.

Portions of the Senate report indicate quite definitely the view that the purpose of the amendment was to unite the Federal and State Government agencies in enforcing both systems of prohibition. Thus the Senate report, quoting from an earlier Senate report on the same subject, said:

> National law, enacted under an amended constitution, could prohibit importation, could prohibit transportation and sale, and in concurrence with like legislation by the States (the union of the power of the nation and the power of the States), thus securing the entire strength of the whole community, could soon put an end to the traffic.

Again quoting from the same report:

> The timorous, uncertain, and ineffectual efforts of the States should not be relied upon. It is indispensable for the very existence of their police powers, * * * that the powers of society, as a whole, operating in and through the national functions, *should reenforce, protect, and preserve the police powers of the State.*

The police power of the States was not destroyed or surrendered, but on the other hand it was protected and preserved, and, through the introduction of the

Federal enforcing power, was reenforced. Hence, the reports justify the inference that the States police power over the liquor traffic was not superseded or impaired by the actual exercise by Congress of the power conferred by the amendment.

Statements made on the Senate and House floors by those in charge of the resolution confirm the foregoing conclusions. Thus, even in the Senate, which struck out the formal reservation of the power of the States to enforce prohibition, Senator Sheppard, author and proponent of the measure, said:

> As I introduced the joint resolution originally, I will say that the language [and nothing in this article shall deprive the several States of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors] stricken out by the committee was added by me in order to emphasize and make plain what was really an existing condition. *The Judiciary Committee, with practical unanimity, said that the States would not be deprived of the power to enact and enforce laws prohibiting the traffic in intoxicating liquors, and therefore did not deem it advisable to place it in the joint resolution.* I trust, therefore, that the amendment will be adopted. * * * If the liquor traffic is to be eradicated, the aid of the Federal Government must be invoked. * * * What nation-widers want is to stop this superior control by the Federal Government and compel it to join with the States in eradication of the liquor traffic on equal terms.

* * * The nation-wide amendment puts the States in a far more dignified position in regard to the liquor traffic than that they now occupy. At present the power of the States to authorize, control, and regulate is secondary to that of the Federal Government. The nation-wide amendment clothes the Federal Government with a jurisdiction and power to prohibit and *does not in any way deprive the State of an equal power of prohibition which they already exercise within their respective borders.* It deprives both the Federal Government and the States of the power to authorize the liquor traffic, treating the Nation and the States absolutely alike.

In the House, Mr. Webb, chairman of the Judiciary Committee and in charge of the resolution on the floor, opened the final debate by explaining the purpose and result of his committee's amendments:

> The first amendment adopted in the Judiciary Committee was the new section 2. As it passed the Senate it provided that the "Congress should have power to enforce it by appropriate legislation." Most of the members, including myself, of the Judiciary Committee, both wet and dry, felt that there ought to be *a reservation to the State also of power to enforce their prohibition laws.* And, therefore, we amended the resolution by providing that the Congress "and the several States" shall have "concurrent" power to enforce this article by appropriate legislation. I believe, regardless of our division on the dry and wet question, every Member will agree with us

that this is a wise and proper amendment. *Nobody desires that the Federal Government shall take away from the various States the right to enforce the prohibition laws of these States.*

I recall the crime of counterfeiting. It is peculiarly a national offense, because it is offensive to the integrity of the national money, and yet nearly all the States have statutes condemning and punishing counterfeiting. But there the jurisdiction is concurrent. We thought it wise to give both the Congress and the several States concurrent power to enforce this article.

To the question, "Suppose there is a conflict * * * between the laws of the State and the laws of the Federal Government?" Mr. Webb replied:

There would be none, because there would be no conflict of jurisdiction.

Thus it appears to be the consensus of committee reports and congressional debate, confirmatory of the indications found in the history of the prohibition movement, that the eighteenth amendment was not intended, either by itself or as a result of congressional action in pursuance of it, to destroy, alienate, or impair, but rather to preserve, supplement, and reenforce the police power of, and its effective exercise by, the States.

The court will find this whole question admirably discussed by Noel T. Dowling, professor of law in the University of Minnesota, in the Minnesota Law Review for May, 1922, in an article entitled: "Concurrent power under the eighteenth amendment."

I must add in candor that, in this article, Mr. Dowling quotes a colloquy on the floor of the House in which Mr. Webb, who, as above quoted, clearly affirmed the reservation of the police powers of the States, yet, having his attention drawn to such a possibility as has arisen in this case, expressed the opinion that the court which first took jurisdiction of the offense against the liquor laws, whether State or Federal, would have the right to proceed, to the exclusion of the courts of the other sovereignty. To quote his words:

> I do not think that the punishment of the offense by the State governments would be followed by the punishment of the same offense by the Federal Government, or vice versa; * * * but one punishment ought to be sufficient, although the offense may be committed against two sovereignties. Now, having concurrent power, I think the Federal Government can not do it, if the State government does it, and vice versa.[7]

It is not clear whether Mr. Webb meant that this exclusive power of the court that first took jurisdiction would be due to the spirit of comity or be a matter of strict legal right. In either event, it was an expression of opinion in a running debate, and possibly he did not sufficiently consider the inevitable effect of such a principle, if it were a matter of strict right and not merely of comity, upon the concurrent power to enforce.

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[7] 56 Cong. Record, 424.

It is easy to see that on this principle of prior jurisdiction this concurrent power of one sovereignty would be largely impaired and might conceivably be altogether destroyed by the other sovereign. For example:

Let us suppose that Congress, in its wisdom, reached the conclusion that it was altogether impossible to stop the liquor traffic with existing penalties, and unless, in the immortal words of Pooh Bah (of Mikado fame), "the punishment was made to fit the crime." Suppose, therefore, that the Volstead law should be amended by providing that anyone who should be convicted of the manufacture of intoxicating liquors should be punished by imprisonment for not less than one year nor more than five. Thus Congress would will that mere payment of fines was inadequate and that nothing short of imprisonment would make the eighteenth amendment effective.

Suppose, then, that a State should simultaneously pass a law that, for a like offense, the punishment should be a fine of $25, and no more.

Is it not obvious that an offender who, by paying a fine of $25, thereby secured an "immunity bath" from the more drastic punishment of Congress, would, in effect, frustrate the will of Congress? What would then become of the concurrent power given to Congress to enforce the policy of prohibition? This collision of policy in the effective matter of punishment—without which such a law is a mere "scrap of paper"—is not fanciful; for the same collision

and the same effects resulted in the enforcement of the oleomargarine statutes. The National Government, in its desire to raise revenue from oleomargarine, made the fines for misbranding and selling without a license very small, and probably that was a recognition of the fact that it was difficult for a dealer in oleomargarine to escape the rigor of the prohibitory statutes in some States, if he complied with the Federal laws. If it had been held, as to this dual system of legislation, that the prosecution of an offender in the Federal courts and the payment of a nominal fine was a bar to a prosecution under the more drastic State laws, then the State laws would have lost much, if not all, of their prohibitory power—and such may be the fate of the eighteenth amendment, if the contention in the instant case of the defendants in error should prevail.

Moreover, as there is now a wide difference of opinion in various States with respect to the wisdom and justice of prohibition, it will follow that, in the States that are called "wet," the offender, by submitting to nominal punishments, will escape the rigors of the Federal laws; while, in the "dry" States, he will not have this "benefit of clergy." As a result, a deplorable lack of uniformity in the enforcement, even of the Federal laws, will follow as a practical consequence.

I appreciate the difficulty in overcoming these practical considerations by the precise language of section 2 of the eighteenth amendment. Thereby concurrent power was conferred "to enforce this

article by appropriate legislation." What is meant by "this article"? The words "by appropriate legislation" seem to me to clearly indicate that "this article" means the great policy of Nation-wide prohibition, which thereby became a part of the fundamental law. It did not mean that the barriers between State and Nation were thereby overthrown and that for the purposes of the prohibitory amendment the legislatures and courts of the States had become Federal agencies. If this were so, the legislation of a State would have a Nation-wide operation, and the courts of a State could punish an infraction of the law whether committed within the State or beyond its borders. Such a construction of the eighteenth amendment would be intolerable. The alternative theory is that the eighteenth amendment was intended to disturb as little as possible our dual system of government. The States were to retain not merely the power to enforce, which is procedural, but the power of legislation, which is substantive in character. By necessary implication such power to make both substantive and procedural law was confined to their own borders. Therefore the "concurrent power to enforce this article by appropriate legislation" simply meant that the Federal Government and the States should continue their respective governmental functions and each should have the power to make laws to enforce the policy of prohibition, provided that the procedural laws were not antagonistic to the great mandate of the first section of the eighteenth amendment. This construction pre-

serves to the States their preexisting police powers, and, as stated, it is in harmony with the history of the legislation and with the construction that has been put upon it by both State and Nation since the eighteenth amendment was adopted.

The alternative construction that by the eighteenth amendment all power over the liquor traffic was vested in the Federal Government and only redistributed by allowing the States a power to enforce a Federal law would throw our whole system of government, so far as the liquor laws are concerned, into "confusion worse confounded."

I did not attempt, either in my original or in this reply brief, to argue this very interesting and important question at length or in detail. I was not unmindful that in the national prohibition cases these questions were argued by many of the most eminent members of the American bar at great length and most exhaustively. Possibly in no other case that was ever before this court were there such volumes of briefs and such a mass of learning. All this material, gathered with such pains and skill, was so recently submitted to the court that it seemed to me unnecessary to inflict upon the court a long and exhaustive brief as to the meaning of the eighteenth amendment, especially as this court, having considered all that the industry and skill of counsel could submit on the question, definitely announced eleven conclusions; and I felt that on the argument of the instant case I could safely start with the assumption that these conclusions were the accepted law and

that the only question that remained was their application to the instant case. The ninth of these conclusions reads as follows:

> 9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and *is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.*

It seems to me that that conclusion answers the question; for it clearly implies that the power of the Federal Government to enforce its own laws and through its own courts "is in no wise dependent on or affected by action or inaction on the part of the several States, or any of them." It may be that, in this clear statement, this court had reference only to legislation or substantive law; but it is equally applicable to procedural law; for the underlying principle of this ninth conclusion would be impaired, if not destroyed, if this court were now to hold that, when the Federal Government seeks to punish an offender against its laws, its hand is paralyzed and its purpose thwarted, if the offender has already been punished for the same act, as an infraction of a State law, by the courts of a State.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

NOVEMBER 28, 1922.

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